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In The

Supreme Court of the United States

October Term, 1995

HAWAIIAN HOMES COMMISSION; KALI WATSON, in his capacity as Chairman of the Hawaiian Homes Commission; WANDA MAE AGPALSA, ANDREW APANA, NANI BRANDT, ROCKNE FREITAS, DENNIS KAUAHI, LLEWELYN KUMALAE, ANN NATHANIEL, PATRICIA SHEEHAN, in their capacities as members of the Hawaiian Homes Commission; and THE DEPARTMENT OF HAWAIIAN HOME LANDS OF THE STATE OF HAWAII,

Petitioners,

vs.

THE AGED HAWAIIANS, an unincorporated association,

Respondents.

On Petition For Writ Of Certiorari To The Supreme Court Of The State Of Hawaii

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

The Hawaiian Homes Commission Act, 42 Stat. 108 (July 9, 1921), as amended, created a homesteading program for the benefit of individuals of at least one-half indigenous-Hawaiian ancestry. The Hawaiian Homes Commission Act was adopted as a federal-state compact pursuant to § 4 of the Hawaii Admission Act, 73 Stat. 4 (March 18, 1959), and Haw. Const., Art. XII, §§ 1-3, and the administration of this project was thereby transferred to the State of Hawaii, subject to continuing federal supervision. The questions presented are:

Whether the Hawaii Supreme Court erred when it decided by a unanimous vote that native Hawaiian applicants who have been waiting for a pastoral homestead lot under the Hawaiian Homes homestead program for more than 40 years are entitled under the Hawaiian Homes Commission Act to notice and an opportunity to be heard after the Hawaiian Homes Commission awards non-economic pastoral lots, arbitrarily denying them the opportunity to ask for a pastoral homestead economic unit?

Whether the Hawaii Supreme Court erred when it decided, by a unanimous vote, that under the unique circumstances of this case, the Hawaiian Homes Commission Act requires the Hawaiian Homes Commission, as a matter of procedural due process, to hold an evidentiary hearing so as not to arbitrarily preclude a native Hawaiian homestead applicant from receiving an award of a pastoral homestead economic unit?

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Petitioners,

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On Petition For Writ Of Certiorari To The Supreme Court Of The State Of Hawaii

RESPONDENTS' BRIEF IN OPPOSITION

Respondents The Aged Hawaiians respectfully request that this Court deny Petitioners' Petition for Writ of Certiorari (hereinafter "Petition"), which seeks review of the Hawaii Supreme Court's opinion below. That opinion is reported at 78 Haw. 192, 891 P.2d 279 (Haw. 1995) and is reprinted in the Petition at Appendix A.

STATEMENT OF THE CASE

The Hawaiian Homes Commission Act of 1920, 42 Stat. 108 (July 9, 1921), as amended (hereinafter "HHCA"), *reprinted in* 1 Hawaii Revised Statutes ("H.R.S.") 167 *et seq.*, established a homestead program for native Hawaiians.[1] The HHCA was adopted as a federal-state compact and as a provision of the Constitution of the State of Hawaii pursuant to § 4 of the Hawaii Admission Act.[2] In these enactments "the federal government set aside certain public lands to be considered Hawaiian home lands to be utilized in the rehabilitation of native Hawaiians, thereby undertaking a trust obligation benefiting the aboriginal people . . . [and] . . . the State of Hawaii assumed this fiduciary obligation upon being admitted to the Union as a state." *Ahuna v. Department of Hawaiian Home Lands,* 64 Haw. 327, 338, 640 P.2d 1161, 1168 (1982). In their administration of the benefit program established by the HHCA, Petitioners herein are to be judged by "the most exacting fiduciary standards." *Id.*, 64 Haw. at 339, 640 P.2d at 1169. Their conduct is to be "measured by the same strict standards applicable to private trustees." *Id.*

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[1] "Native Hawaiians" are defined in the HHCA as "any descendant of not less than one-half part of the blood of the races inhabiting the Hawaiian Islands previous to 1778." HHCA, § 201(7).

[2] Pub. L. 86-3, 73 Stat. 4 (Mar. 18, 1959) (providing that as a compact with the United States the HHCA shall be adopted as a provision of the Constitution of the State of Hawaii); see also Haw. Const., Art. XII, § 1-3 (adopting HHCA as "a law of the State," § 1, as "a compact with the United States," §§ 2, 3, and "as a provision of the constitution of this State," § 3).

The present case, though superficially complicated in light of the forty-year history of the underlying controversy, is at heart a simple dispute in which Respondents brought suit: (1) to challenge Petitioners' unlawful failure to consider awarding Respondents pastoral homestead leases of a size sufficient to support commercial ranching (*i.e.*, an "economic unit"), benefits for which they had applied; and (2) to enjoin future awards of pastoral lots under a plan which was conceived in violation of state administrative law and due process, and which Respondents claim violates the HHCA because it provides only for the award of lots too small to support economically viable commercial ranching.

Respondents were among 427 persons who, in 1952, applied for pastoral homestead leases at Puukapu, Island of Hawaii, pursuant to the HHCA; 187 of these persons, including Respondents and James Akiona, were found to be eligible for such awards. Only 48 lots, ranging in size from 200 to 300 acres, were then deemed available. The remaining eligible persons, including Respondents and Akiona, were placed on a "waiting list" pending future development of additional pastoral lots. *Aged Hawaiians v. Hawaiian Homes Commission*, 78 Haw. 192, 195, 891 P.2d 279, 282 (1995). In 1988, nearly forty years later, they were still on the waiting list. Accordingly, on July 25, 1988, Akiona requested the Hawaiian Homes Commission ("Commission") to grant him a "contested case hearing" (an administrative hearing pursuant to the Hawaii Administrative Procedures Act, Chapter 91, H.R.S.) in which he could challenge the Commission's then-pending proposal to award small "subsistence ranching" leases at

Puukapu which were, he argued, inconsistent with §§ 207 and 219.1 of the HHCA. *Aged Hawaiians*, 78 Haw. at 195-96, 891 P.2d at 282-83. Akiona's request was denied on February 21, 1989, and on July 17, 1989, Respondents (then including Akiona, who later withdrew from this litigation) filed their complaint in the present action (twice amended thereafter) in State court seeking declaratory and injunctive relief against Petitioners and their predecessors in office. Respondents successfully challenged the Commission's failure to adopt administrative rules governing the award of pastoral lots. Later, they successfully challenged the validity of the rules subsequently adopted by the Commission under the "void for vagueness" rule. Their remaining claims relating to violations of the HHCA and of Respondents' due process rights under U.S. Const., amend. XIV, with regard to Petitioners' adoption of the 1990 pastoral lot size plan (the "1990 Plan"), were dismissed by the trial court for failure to exhaust administrative remedies. Respondents took this interlocutory appeal pursuant to Rule 54(b), Hawaii Rules of Civil Procedure. *Aged Hawaiians*, 78 Haw. at 197-200, 891 P.2d at 284-87.

The Hawaii Supreme Court, in a unanimous opinion, reversed the trial court's dismissal of Respondents' claims. While expressing no opinion as to whether or not Respondents were in fact entitled to be awarded pastoral homestead leases of a size constituting an "economic unit," the court nevertheless declared that: (1) the HHCA imposed a duty upon Petitioners to place native Hawaiian beneficiaries "on the land to the fullest extent possible," *Aged Hawaiians*, 78 Haw. at 209, 891 P.2d at 296 (*quoting Ahuna*, 64 Haw. at 336, 640 P.2d at 1167); and that

(2) any benefits due Respondents under the HHCA were a constitutionally protected "property interest" rather than a mere "expectancy." *Aged Hawaiians*, 78 Haw. at 211, 891 P.2d at 298. It further held that, as the award of an "economic unit" of land for ranching purposes was a benefit which could not be "arbitrarily" precluded by the Commission, *id.*, Petitioners violated due process when they failed to provide Respondents an adequate forum in which to contest the legality of the denial of the award of such leases and of the award of additional "subsistence ranching" lots incapable of supporting viable commercial ranching under the 1990 Plan. *Id.* Accordingly, the court ordered Petitioners to grant Respondents an opportunity to contest the denials and to challenge the lease award plan in a contested case hearing under Chapter 91, H.R.S. *Aged Hawaiians*, 78 Haw. at 213, 891 P.2d at 300. Petitioners now seek review in this Court.

REASONS FOR DENYING THE PETITION

The Hawaii Supreme Court properly interpreted the HHCA in defining Petitioners' duties thereunder. In any event, its interpretation of this unique Congressional enactment providing benefits to native Hawaiians, a federal-state compact incorporated as part of the Constitution of the state of Hawaii, raises no legal questions of more than purely local significance and implicates no substantial issues of federalism. Judicial economy will not be furthered by review of this interlocutory opinion as after reversal by this Court on remand the court below could reach the same result (remand for agency hearing) on independent state grounds. The court below applied

well-settled principles of state law in determining that benefits under the HHCA are "property interests" protected by due process. Accordingly, Petitioners fail to satisfy criteria traditionally applied by this Court in determining whether or not to grant a Writ of Certiorari.

I

CONCERNS OF FEDERALISM AND JUDICIAL ECONOMY COUNSEL AGAINST REVIEW

Petitioners' efforts to find support for its position in the doctrine of federalism, Petition, at 25 n.7, are misguided. These concerns are implicated to at most a minor degree where, as here, it is argued that a state court has given its citizens "too much" due process as against a state agency by choosing to recognize a statutory entitlement scheme as creating a protected property interest. Petitioners' concerns based on *Utah Division of State Lands v. United States*, 482 U.S. 192 (1987), *see* Petition, at 25 n.7, are not on point, as the result in that case stems from the special considerations that govern ownership of lands under navigable waters. *Utah Division of State Lands*, 482 U.S. at 195-98 (*citing Shively v. Bowlby*, 152 U.S. 1 (1894)). In any event, the burdens imposed on the State of Hawaii by Congress in the HHCA *were* "definitely declared or otherwise made very plain," *cf.* Petition, at 25 n.7, both in the HHCA itself and in §§ 4 and 5(f) of the Hawaii Admission Act. Furthermore, the recognition of the HHCA as a source of protected property interests is well-established in Hawaii law. *See infra.* Thus, to the extent issues of federalism are relevant here, they counsel

against granting review of this highly fact-specific case involving legal issues of purely local interest and of little if any precedential value beyond the limits of the State of Hawaii.

Another factor arguing against review is the fact that reversal of the lower court's decision on federal grounds would not prevent the Hawaii Supreme Court from reaching exactly the same result on remand under either of two separate theories of independent *state* grounds. First, on remand, the Hawaii court could well find that the due process provisions of the *state* constitution, Haw. Const., Art. I, § 5, require Petitioners to provide Respondents with the same Chapter 91, H.R.S., contested case hearing it has already granted them as a matter of *federal* law. Although such a state law claim could not be asserted under 42 U.S.C. § 1983, the waiver of sovereign immunity provided in § 661-1, H.R.S. (1985), pleaded by Respondents, *Aged Hawaiians*, 78 Haw. at 198 n.11, 891 P.2d at 285 n.11, could provide an alternative means of asserting Respondents' rights under Chapter 91, H.R.S., to a contested case hearing. Second, such relief would also be available under § 673-2(a), H.R.S. (Supp. 1992), also pleaded by Respondents. *Aged Hawaiians*, at *id.*[3]

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[3] Section 673-2(a), H.R.S., provides that HHCA beneficiaries "shall have the right to bring an action in the circuit courts of the State to resolve controversies relating to the Hawaiian home lands trust described in section 673-1(a)(1)." Section 673-1(a), H.R.S. (Supp. 1992), in turn, provides that "[t]he State of Hawaii waives its immunity for any breach of trust or fiduciary duty resulting from the acts or omissions of its agents, officers and employees in the management and disposition of trust funds and resources of: (1) the Hawaiian home lands trust

Accordingly, review by this court would not further judicial economy as even a reversal of the lower court's opinion, issued on an interlocutory appeal, would likely have no effect on the ultimate disposition of the case (remand for agency hearing).

II

THE HAWAII SUPREME COURT CORRECTLY INTERPRETED PETITIONERS' DUTIES UNDER THE HAWAIIAN HOMES COMMISSION ACT.

Petitioners do not deny the existence of the fiduciary duty recognized in *Ahuna* and by the court below, but challenge instead the Hawaii Supreme Court's conclusion, first stated in *Ahuna* and reiterated in *Aged Hawaiians*, that the HHCA grants its native Hawaiian beneficiaries a right "to be placed on the land to the fullest extent possible." Petition at i, 7, 19. Petitioners proclaim this to be an onerous and ill-defined requirement, Petition, at 6-7, 22-24, and argue that "[t]his amorphous standard could not possibly give rise to 'a legitimate claim of entitlement.' " *Id.* at 22 (citation omitted).

Petitioners are simply wrong. Just such a duty is clearly implied: (1) in the legislative history of the HHCA, where it is stated that "the Hawaiian must be placed upon the land in order to insure his rehabilitation," *Ahuna*, 64 Haw. at 336-37, 640 P.2d at 1167 (*quoting*

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under Article XII, sections 1, 2, and 3 of the Constitution of the State of Hawaii, implementing sections 4 and 5(f) of the Admission Act (Act of March 18, 1959, Public Law 86-3, 73 Stat. 4)[.]"

H.R. Rep. No. 839, 66th Cong., 2d Sess. 4 (1920)); and (2) in the undisputed existence of Petitioners' fiduciary duty to the native Hawaiian beneficiaries of the HHCA. If one of the goals of the HHCA is that "the Hawaiian must be placed upon the land in order to insure his rehabilitation," as recognized in *Ahuna*, at *id.*, it is reasonable that, as trustees fulfilling their duty "to make trust property productive," *id.*, at 340, 640 P.2d at 1169, Petitioners should be under a duty to establish eligible beneficiaries as homesteaders on trust land "to the fullest extent possible."

On remand Petitioners will of course be free to show, if they can, that in light of the constraints imposed by the funding available to them, it was simply not "possible" to provide homestead leases of the kind sought by Respondents. Similarly, the court below did not hold that Petitioners are under a duty to award Respondents a pastoral homestead lot of a size sufficient to form an "economic unit." Instead, it simply stated that "the Commission may not *arbitrarily preclude*" such an award. *Aged Hawaiians*, 78 Haw. at 211, 891 P.2d at 298 (emphasis added). On remand, Petitioners are free to attempt to justify their refusal to provide such lots. They are simply prevented from *arbitrarily* refusing to make such lots available. If Petitioners' discretion to manage and to allocate trust resources under the HHCA is in fact as wholly unfettered and standardless as they claim, Petition at 7-14, Petitioners will handily defeat Respondents' challenge on the merits in the proceedings below. *See Ahia v. Department of Transportation*, 69 Haw. 538, 751 P.2d 81 (1988) (recognizing decisionmaking authority of the Commission). If Petitioners' discretion is less unconstrained than they imagine,

however, it will instead be Respondents who prevail on remand.

III

BENEFITS UNDER THE HAWAIIAN HOMES COMMISSION ACT ARE PROPERTY RIGHTS PROTECTED BY THE DUE PROCESS CLAUSE

As Petitioners concede,

> property interests "are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law – rules or understanding that secure certain benefits and that support claims of entitlement to those benefits.

Petition, at 17 (*quoting Board of Regents v. Roth*, 408 U.S. 564, 577 (1977)). The benefits and entitlement to those benefits that are at issue here derive from the HHCA and extend to all eligible native Hawaiian beneficiaries. Respondents' eligibility under the HHCA has been recognized since 1952. *Aged Hawaiians*, 78 Haw. at 195, 891 P.2d at 282. As qualified native Hawaiian beneficiaries, Respondents may obtain a homestead lease granting them "the right to the use and occupancy of a tract or tracts of Hawaiian home lands within the following acreage limits per each lessee: . . . (2) not more than one hundred acres of irrigated pastoral lands and not more than one thousand acres of other pastoral lands[.]" § 207(a), HHCA. The court below also listed numerous additional benefits eligible beneficiaries may obtain under the HHCA, *Aged Hawaiians*, 78 Haw. at 211-212, 891 P.2d at 297-98 (*quoting* §§ 214, 219, 219.1, 220, and 221, HHCA), and noted that "[t]hese provisions contemplate

and seek to promote full time ranching, farming and aquaculture by native Hawaiians on homestead lots." *Aged Hawaiians*, 78 Haw. at 212, 891 P.2d at 299.

As noted earlier, the HHCA is simultaneously a statute enacted by Congress, a federal-state compact adopted by Congress, and a provision of the constitution of the State of Hawaii. Accordingly, when the Hawaii Supreme Court interprets the HHCA as endowing eligible beneficiaries with a right "to be placed on the land to the fullest extent possible," *Aged Hawaiians*, 78 Haw. at 209, 891 P.2d at 296 (quoting *Ahuna*, 64 Haw. at 336, 640 P.2d at 1167), and thereafter determines that this right is a *property right* worthy of due process protection, it is not only interpreting federal law but is simultaneously making a definitive determination that, *as a matter of Hawaii law*, such a property right exists. Such a definitive determination of state law by a state court should end the inquiry in the absence of the exceptional circumstances not present here.

Furthermore, contrary to Petitioners' assertion that the court below undertook an "unprecedented expansion of the standard for defining property interests that mandate due process," Petition, at 21, the lower court's decision was well within the bounds of prior jurisprudence in what could fairly be said to be a well-settled area of law. The Hawaii court had already concluded that an HHCA homestead lease is a protected property right, and in cancelling such a lease the Commission must comply with due process requirements. *In re Smith*, 68 Haw. 466, 719 P.2d 397 (1986). While, as a general rule, beneficiaries under a statutory welfare plan have no "property right in the allocation of assets to – or even within – the program itself, or even to a particular level of benefits," Petition, at

24, the HHCA created a *trust* in favor of its beneficiaries. *Aged Hawaiians*, 78 Haw. at 206 & N.24, 891 P.2d at 293 & n.24; *see also Ahuna*. The rights of Respondents, as beneficiaries of that trust, include "the right to (a) compel the performance of trust duties, (b) enjoin the commission of a breach of trust by the trustee, and (c) compel the trustee to redress a breach of trust." *Aged Hawaiians*, 78 Haw. at 208 n.26, 891 P.2d at 295 n.26 (*citing Price v. Akaka*, 3 F.3d 1220, 1224-25 (9th Cir. 1993) ("*Akaka II*"), *cert. denied*, ___ U.S. ___, 114 S.Ct. 1645 (1994)).

Petitioners may argue that the rights of beneficiaries who have applied for but have not yet been awarded homestead lots do not amount to more than a "unilateral expectation" because of the funding limitations that have been imposed on Petitioners over the years and their resulting inability to award homestead lots to *all* eligible beneficiaries in a timely manner. *See* Petition, at 21-24. Nevertheless, however, Respondents' assertion that their rights under the HHCA rise to the level of a property right is not thereby defeated, because under the common law of trusts, held applicable by *Ahuna*, "one whose status as a beneficiary depends upon the discretion of the trustee nevertheless may sue to compel the trustee to abide by the terms of the trust." *Price v. Akaka*, 928 F.2d 824, 827 (9th Cir. 1990) (*Akaka I*) (*citing Restatement (Second) of Trusts*, § 214(1), comment a), *cert. denied*, 502 U.S 967 (1991). Indeed, any interest, whether vested or contingent, is sufficient to give a beneficiary the right to protect the trust fund and to see that the trust is properly executed. 90 C.J.S., *Trusts* § 457 at 895 n.46 (*citing Schuster v. Schuster*, 75 Ariz. 20, 251 P.2d 631 (Ariz. 1952)). While Respondents cannot *require* Petitioners to award them the

leasehold lot of a particular size, they should be free to enjoin the award of lots to others under a plan that is substantively unlawful.

Here Petitioners cannot distinguish the long line of cases wherein the Court has held that statutorily created entitlements for persons qualified to receive them are appropriately treated as a form of "property" protected by due process.[4] Furthermore, in recognizing the HHCA as creating a protected interest in its beneficiaries, the Hawaii Supreme Court was merely following the lead of the Hawaii State Legislature. In recent years the latter has gone to great lengths to safeguard the rights of HHCA beneficiaries and to provide them with a forum to obtain redress for breaches of fiduciary obligations imposed by the HHCA.[5] Thus in *Aged Hawaiians* the Hawaii Supreme

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[4] *See, e.g., Goldberg v. Kelly,* 397 U.S. 254 (1970) (welfare benefits); *Richardson v. Belcher,* 404 U.S. 78 (1971), *Richardson v. Perales,* 402 U.S. 389 (1971), and *Flemming v. Nestor,* 363 U.S. 603 (1960) (social security disability benefits); *Atkins v. Parker,* 472 U.S. 115 (1985) (food stamp benefits); *Cleveland Board of Education v. Loudermill,* 470 U.S. 532 (1985) (civil service employment); *Logan v. Zimmerman Brush Co.,* 455 U.S. 422 (1982) (unlawful termination).

[5] *See* 1988 Haw. Sess. Laws. Act 395, codified as Chapter 673, H.R.S. (providing prospective waiver of sovereign immunity to permit suit to enjoin breaches of trust or of fiduciary duties imposed under the HHCA or §§ 4 and 5(f) of the Hawaii Admissions Act, including award of attorneys fees to prevailing plaintiffs, and directing governor to propose mechanism to resolve similar claims arising from 1959 to 1988); 1991 Haw. Sess. Laws, Act 323, codified as Chapter 674, H.R.S. (establishing administrative agency to resolve claims of individual beneficiaries of the HHCA for "actual damages" resulting from breaches of trust occurring from 1959 to 1988); 1993 Haw. Sess.

Court broke no new ground in defining the range of constitutionally protected property interests recognized under Hawaii law, and its decision should be respected by this Court.

IV

THE HAWAII SUPREME COURT PROPERLY DETERMINED THAT DUE PROCESS REQUIRES THE AVAILABILITY OF A TRIAL-TYPE HEARING UNDER THE CIRCUMSTANCES OF THIS CASE

Petitioners argue that Respondents were accorded all of the "process due" them because Petitioners' refusal to make large pastoral leases available was an act of quasi-legislative decisionmaking. Petition, at 26-27 (*citing, inter alia, Bi-Metallic Investment Co. v. State Board of Equalization*, 239 U.S 441, 445 (1915)).

Petitioners' argument fails, first, because the adoption of the 1990 Plan, one of the principal targets of Respondents' suit, was *not* a "quasi-legislative decision" relating to, for example, "whether to build sewers on

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Laws, Act 351 (amending Chapter 674, H.R.S., for the purpose, *inter alia*, of extending the period during which claimants may file actions against the State under that chapter); 1993 Haw. Sess. Laws, Act 352 (in response to governor's proposal mandated under 1988 Haw. Sess. Laws, Act 395, providing administrative mechanism to redress time-barred claims relating to breach of State of Hawaii's fiduciary duties under the HHCA arising from 1959 to 1988); Hawaii State Legislature, 1995 Special Session, Act 14 (establishing program whereby, *inter alia*, $600 million will be paid over a 20-year period to redress breaches of the State of Hawaii's HHCA trust obligations occurring from 1959 to 1988).

Maui, to run roads on Molokai, or to make new subdivision lot sizes bigger on Kauai, or smaller on the Big Island." Petition, at 7. Instead, it related to a *site-specific proposal* to develop homestead lots in a specified configuration on a *particular* 3000 acre parcel of homestead lands at Puukapu on the Island of Hawaii, the very lands which were the subject of Respondents' pending homestead applications. *Aged Hawaiians,* 78 Haw. at 197, 891 P.2d at 284. Thus, Petitioners are not merely challenging a general rule of conduct but are instead among the "very small number of persons" who are "exceptionally affected" by Petitioners' action. *Cf.* Petition, at 27 (*quoting Vermont Yankee Nuclear Power Cop. v. National Resources Defense Council,* 435 U.S. 519, 542 (1972)). In a recent case, citation to which is glaringly absent from the Petition, the Hawaii Supreme Court drew a similar distinction in *denying* the existence of a due process right to a trial-type hearing to third parties seeking to challenge the Commission's actions where no property interest was at issue.[6] Contrary to Petitioners' assertions here, the Hawaii Supreme Court has carefully weighed the effects of this decision on the Commission's important work on behalf of native Hawaiians and has no intention of setting in motion the parade of horribles Petitioners offer up in an effort to draw the Court's attention.[7]

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[6] *Bush v. Hawaiian Homes Commission,* 76 Haw. 128, 135-36, 870 P.2d 1272, 1279-80 (1994) (Hawaiian homestead lessees seeking to challenge Commission's approval of "third-party agreements" (cropping agreements) affecting lands leased to other lesees had no due process right to a contested case hearing under Chapter 91 because no property interest was at issue).

[7] *See especially* Petition, at 7 (alleging that the lower court's decision would grant each of the twenty thousand HHCA

Petitioners' argument also fails for the reason that, as the HHCA *does* create entitlements that are a "property interest" in the hands of its beneficiaries, *see* preceding section, the requirements of due process are applicable, including the requirement that *some* adequate forum be made available to one who is denied a statutory benefit to which he is arguably entitled. The presence of an adequate post-deprivation remedy pursuant to state law can sometimes cure the constitutional defect that would otherwise result from the absence of a pre-deprivation hearing, *Parratt v. Taylor*, 451 U.S. 527 (1981), *overruled in part on other grounds, Daniels v. Williams*, 474 U.S. 327 (1986),[8] however the adoption of Petitioner's position and dismissal of Respondents' claims would leave Respondents without *any* forum, pre- or post-deprivation,[9] federal or state, in which to fully contest the legality of Respondents' denial of the statutory benefits at issue here. Petitioners would restrict Respondents to an inadequate pre-

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beneficiaries "the right to federally-compelled trial-type administrative process prior to every management decision made by the Commission.").

[8] *See also Chongris v. Board of Appeals Town of Andover*, 811 F.2d 36, 40 (1st Cir.) (no due process violation because state procedures "provide[d] a suitable form of pre-deprivation hearing coupled with the availability of meaningful judicial review"), *cert. denied*, 483 U.S. 1021 (1987); this case, 811 F.2d at 41, was cited by Petitioners for the proposition that trial-type hearings are not required for "appropriation decisions," Petition, at 26 n.8, although such a characterization of the case seems questionable.

[9] The distinction between a pre- and post-deprivation hearing fades into insignificance here, in light of the fact that Respondents have been waiting *since 1952* to obtain benefits for which they believe themselves to be eligible.

deprivation hearing (the opportunity to offer testimony at a public hearing, with no right of cross-examination or opportunity for full legal argument) and *no* means whatsoever of obtaining post-deprivation judicial review. Petitioners thus do not merely seek to prevail on the merits, but instead ask this Court to insulate their denial of benefits from substantive review in *any* forum, a result prohibited by the requirements of due process.

The zoning cases cited by Petitioners[10] are not on point. They merely state that third parties seeking to challenge the rezoning of properties owned by others and in which they themselves have no legal interest have no due process right to notice and a trial-type hearing. Here, however, Respondents claim a legal interest, as eligible beneficiaries on the waiting list for HHCA pastoral homestead leases at Puukapu, to lease the *particular* lands that are the subject of Petitioners' action.

V

SANDIN V. CONNER, RECENTLY DECIDED BY THIS COURT, GIVES NO AID TO PETITIONERS' CAUSE

Petitioners' invocation of *Sandin v. Conner*, ___ U.S. ___, 63 U.S.L.W. 4601 (1995), decided subsequent to the filing of the Petition, is misplaced. In *Sandin*, this Court declined to recognize state prison regulations as creating a constitutionally protected *liberty* interest in favor of

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[10] Petition, at 26 n.8, citing *Sandy Beach Defense Fund v. City Council*, 70 Haw. 361, 773 P.2d 250 (1989); *Fusco v. State of Connecticut*, 815 F.2d 201, 205-06 (2d Cir.), *cert. denied*, 484 U.S. 849 (1987).

convicted inmates, stating that "Conner's discipline in segregated confinement did not present the type of atypical, significant deprivation in which a state might conceivably create a liberty interest." *Id.*, 63 U.S.L.W. at 4605. This Court was rightly cautious in permitting a federal court to interpret state law as creating a protected liberty interest in favor of prison inmates, the recognition of which would lead "to the involvement of federal courts in the day-to-day management of prisons." *Id.*, at 4604. *Sandin* did not, however, purport to restructure the manner in which either liberty or property interests are accorded due process protection outside of the prison context. Petitioners' reliance on *Sandin* may have been based on their hope that the Court would speak more broadly than in fact it did. In any event, a general application of the *Sandin* standard to *all* liberty interests would not necessarily affect the present case, where it is instead a *property* interest that is at issue. Respondents here have actively relied upon their entitlement under the HHCA since 1952, a period in excess of forty years. In the context of property interests it is just such reliance that "the Due Process Clause often aims to protect[.]" *Sandin*, at 4608 (Breyer, J, joined by Souter, J, dissenting).

CONCLUSION

Accordingly, for all the foregoing reasons, Petitioners' request for a Writ of Certiorari should be denied.

Respectfully submitted,

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